Nos. 91-543; 91-558; 91-563

FEB 13 1992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE STATE OF NEW YORK; THE COUNTY OF ALLEGHENY, NEW YORK; and THE COUNTY OF CORTLAND, NEW YORK,

Petitioners,

vs.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

STATE OF WASHINGTON, STATE OF NEVADA, and STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER THE COUNTY OF CORTLAND, NEW YORK

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QUESTIONS PRESENTED

1. Whether constitutional principles of federalism expressed in the Tenth Amendment and the Guarantee Clause of the United States Constitution bar Congress from issuing direct commands to the states compelling them to undertake specific waste disposal programs, precluding their withdrawal from the field, and punishing noncompliance by forcibly transferring the waste to the states, as has been done in the Low-Level Radioactive Waste Policy Amendments Act of 1985.

2. Whether the political process adequately protects state sovereignty when Congress avoids political accountability for an unpopular radioactive waste disposal program by shifting the entire financial and administrative responsibility for the program exclusively to the states.

LIST OF PARTIES TO THE CASE IN THE SECOND CIRCUIT

1. The State of New York, Plaintiff-Appellant

2. The County of Allegany, New York, Plaintiff-Appellant

3. The County of Cortland, New York, Plaintiff-Appellant

4. The United States of America, Defendant-Appellee

5. James D. Watkins, as Secretary of Energy, Defendant-Appellee

6. Kenneth M. Carr, as Chairman of the United States Nuclear Regulatory Commission, Defendant-Appellee[1]

7. The United States Nuclear Regulatory Commission, Defendant-Appellee

8. Samuel K. Skinner, as Secretary of Transportation, Defendant-Appellee[2]

9. Richard Thornburgh, as United States Attorney General, Defendant-Appellee[3]

10. State of Washington, Intervenor-Appellee

11. State of Nevada, Intervenor-Appellee

12. State of South Carolina, Intervenor-Appellee

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[1] Kenneth M. Carr, former Chairman of the United States Nuclear Regulatory Commission, was named as a party in the proceedings below. Pursuant to Supreme Court Rule 35.3, Ivan Selin, Mr. Carr's successor in office, has been substituted as a party in this proceeding.

[2] Samuel K. Skinner, former Secretary of Transportation, was named as a party in the proceedings below. Pursuant to Supreme Court Rule 35.3, Admiral James B. Busey IV, Mr. Skinner's successor in office, has been substituted as a party in this proceeding.

[3] Richard Thornburgh, former United States Attorney General, was named as a party in the proceedings below. Pursuant to Supreme Court Rule 35.3, William P. Barr, Mr. Thornburgh's successor in office, has been substituted as a party in this proceeding.

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131 Cong. Rec. S18,113 (daily ed. Dec. 19, 1985) (statement of Sen. Johnston) 27 n.17

La Pierre, *Political Accountability in the National Political Process — The Alternative to Judicial Review of Federalism Issues*, 80 Nw. U. L. Rev. 577 (1985) 25

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OPINIONS AND JUDGMENT BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated August 8, 1991, is reported at 942 F.2d 114 and is reprinted at 1a of the appendix to the petition for a writ of certiorari submitted by the County of Cortland, New York ("Cortland County").

The opinion of the United States District Court for the Northern District of New York, dated December 7, 1990, is reported at 757 F. Supp. 10 and is reprinted at 18a of the appendix to Cortland County's petition for a writ of certiorari.

The judgment of the United States District Court for the Northern District of New York, dated December 26, 1990, is reprinted at 27a of the appendix to Cortland County's petition for a writ of certiorari.

JURISDICTION

Petitioner Cortland County, together with the State of New York and the County of Allegany, New York, filed this action on or about February 12, 1990. The district court had jurisdiction of the case pursuant to 28 U.S.C. §§ 1331, 1337, 1346, 2201, and 2202. The trial court heard oral argument on dispositive motions on December 7, 1990 and issued an opinion from the bench that day in favor of the defendants. Cortland County filed a Notice of Appeal on or about January 30, 1991. The opinion of the United States Court of Appeals for the Second Circuit, affirming the decision below, was issued on August 8, 1991. Cortland County filed a petition for a writ of certiorari on October 3, 1991, pursuant to 28 U.S.C. § 1254(1). This Court granted Cortland County's petition on January 10, 1992.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves fundamental principles of federalism established in the United States Constitution, especially as expressed in the following provisions:

The Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

The Guarantee Clause: "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. Const. art. IV, § 4.

The statute challenged in this case is the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b-2021j. Pertinent portions of the statute challenged are reprinted at 29a-33a of the appendix to Cortland County's petition for a writ of certiorari.

STATEMENT OF THE CASE

This declaratory judgment action challenges the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("LLRWPAA"), 42 U.S.C. §§ 2021b-2021j, as violative of constitutional principles of federalism. LLRWPAA is the federal response to the perceived shortage of low-level radioactive waste ("LLRW") disposal facilities that existed in the mid-1980s.

The national effort to expand LLRW disposal capacity began in the late 1970s, following the closure of three of the existing six disposal facilities as a result of serious environmental problems. In furtherance of that effort, the State Planning Council on Radioactive Waste, the National Conference of State Legislatures, and the National Governors' Association ("NGA") submitted recommendations to Congress.

In its final report, the NGA recommended that the states "accept primary responsibility" for the safe disposal of LLRW generated within their borders, "except for waste generated at federal government facilities." J.A.* 114a (NGA Recommendation No.1). The NGA also suggested that Congress "create a special discretionary fund which would confer compensatory and financial benefits to site states and site communities . . . ." J.A. 130a-31a (NGA Recommendation No. 8). In addition, the NGA's report stated unequivocally:

* "J.A." refers to the Joint Appendix submitted in connection with this proceeding. "C.A. App." refers to the joint appendix submitted to the Court of Appeals for the Second Circuit in connection with the appeal below.

> Federal funds must be made available for site characterization studies, planning grants, and other technical assistance for states to develop regional sites. Such funding should be made available in a manner to encourage development of regional sites.

J.A. 133a (NGA Recommendation No. 9). The NGA appeared to contemplate that six regional disposal sites would be constructed pursuant to their recommendations. *See* J.A. 119a-20a (NGA Recommendation No. 3).

Instead of adopting the recommended policy of *voluntary, primary* state control, with continued federal responsibility for disposal of federally generated waste and substantial federal financial assistance to the states, Congress altogether abdicated its responsibility for the siting and funding of LLRW disposal facilities by transferring that responsibility exclusively to the states. On December 22, 1980, Congress enacted the Low-Level Radioactive Waste Policy Act (the "LLRW Policy Act"), Pub. L. No. 96-573, 94 Stat. 3347, mandating that each state (alone or in a compact with other states) take responsibility for providing for disposal of the LLRW generated within its borders – including some of the waste generated by the federal government. Congress appropriated no funds whatsoever for direct financial assistance to the states.

The LLRW Policy Act set forth a specific timetable for facility development. Congress encouraged compliance by empowering compacts formed pursuant to the statute to exclude waste generated outside the compact region from disposal at the compact facility after January 1, 1986. *See id.* §§ 4(a)(1), 4(a)(2)(B). Nevertheless, in the years following the enactment of the LLRW Policy Act, there was little progress in developing new sites. With the 1986 deadline looming, it became clear that enforcement of the exclusion provision would deny many LLRW generators access to licensed facilities for disposal of their waste.

Consequently, Congress amended the LLRW Policy Act in January 1986, enacting LLRWPAA, which extended the exclusion provision, set new deadlines for facility development, and established stiff monetary sanctions for failure to meet them.

See 42 U.S.C. § 2021e(d). Congress also provided that if a state is unable, by January 1, 1996, to provide for disposal of all commercially generated LLRW produced within its borders, the waste generators may compel the state to take title to their LLRW and either deliver the waste to the state or hold it liable for any damages they incur as a result of the state's failure to take possession. *See* 42 U.S.C. § 2021e(d)(2)(C) (the "Take Title Provision").

While Congress unloaded the onerous duties of disposal onto the states, it perpetuated exclusive federal authority to determine how LLRW should be regulated. The licensing and operations of nuclear power plants, which produce most of the nation's LLRW (by volume and radioactivity), are subject to the sole jurisdiction of the Nuclear Regulatory Commission (the "NRC"). *See* J.A. 51a, 60a. LLRWPAA confers no power upon the states to regulate the generation, treatment, management, transportation, or disposal of LLRW in a manner inconsistent with NRC or Department of Transportation regulations. *See* 42 U.S.C. § 2021d(b)(3).

Indeed, New York's efforts to limit the proliferation of nuclear power plants and the radioactive waste they generate have been repeatedly thwarted by the federal government. Despite New York's sustained and vigorous opposition, the Shoreham nuclear power plant was licensed by the NRC.[5] *See Cuomo v. Nuclear Regulatory Commission*, 772 F.2d 972 (2d Cir. 1985); *Cuomo*

[5] Much of the litigation concerning the reactor at Shoreham arose out of a dispute over emergency planning. The off-site emergency planning rules adopted by the NRC in 1980, *see* 10 C.F.R. §§ 50.33, 50.47, 50 App. E, established a central role for state and local governments – virtually the only opportunity these governments had to try to stop the plant from opening. *See* Note, *Federalism and Offsite Emergency Planning for Nuclear Reactors: The Shoreham Impasse*, 66 B.U.L. Rev. 229, 256 (1986). Specifically, the rules required that a proposed licensee submit state and local governments' emergency response plans for a proposed nuclear power plant to the NRC as a condition for the issuance of a license for the plant. After Suffolk County concluded that no emergency plan could adequately protect the population living near Shoreham, the county and the State of New York refused to submit such a plan to the NRC. The NRC reinterpreted its rules to circumvent the requirement for state and local participation, and the State sued. (It should be noted that LLRWPAA does not allow state or local governments to block an LLRW disposal facility by withholding an emergency plan.)

v. Long Island Lighting Co., No. 84-4615, slip op. (Sup. Ct. 1985). The City of New York has also unsuccessfully endeavored to restrict the shipment of radioactive material through the city limits. *See City of New York v. United States Department of Transportation*, 715 F.2d 732 (2d Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984). Congress has thus deprived the State of any meaningful authority over the production and environmental control of the waste, *see* J.A. 60a-61a, while saddling it (and select counties) with politically explosive, economically risky, and environmentally threatening LLRW disposal obligations.

Under LLRWPAA, the states may, but are not required to, dilute these burdens by entering compacts for operation of regional LLRW disposal facilities. *See* 42 U.S.C. § 2021c. The statute does not, however, require compact members to admit other interested states. *See* Office of Technology Assessment, *Partnerships Under Pressure* 12 n.20 (1989). As a result, LLRWPAA contains no internal limit on the number of disposal sites that may be established pursuant to its mandate. Rather, any state that is unable or unwilling to enter a compact or that cannot contract to send the LLRW generated within its borders to an out-of-state site must build its own facility, irrespective of the environmental suitability of that state as a location for shallow land burial.[6] As such a state, New York is now compelled to develop its own disposal facility in-state.[7]

[6] To Cortland County's knowledge, the NRC has never licensed any LLRW disposal facility using a disposal method other than shallow land burial. Based on New York's disastrous experience at West Valley, however, that disposal method is now unlawful in New York. *See* N.Y. Envtl. Conserv. Law § 29-0103. Moreover, the NRC has yet to promulgate regulations describing technical and licensing requirements for alternatives to near-surface disposal. States wishing to adopt such alternatives – a drift mine or a deep vertical shaft mine, for example – are therefore forced to work in a regulatory vacuum and run the risk that, at the end of a lengthy research and development process, licenses will not be granted.

[7] Moreover, LLRWPAA's disposal requirement may effectively preclude New York from experimenting with innovative LLRW management techniques, such as long-term storage at the point of generation. *See* 131 Cong. Rec. S18,113 (daily ed. Dec. 19, 1985) (statement of Sen. Hart). On-site storage would, however, be a practical alternative for LLRW management in New York. *See*

(Footnote continued)

Siting activities undertaken pursuant to LLRWPAA's mandate have already caused Cortland County severe financial harm. *See* J.A. 66a-67a. Land values have dropped by as much as 50 percent in the Town of Taylor and other towns in close proximity to the proposed disposal sites. *See id.* at 66a. By September 1990, Cortland County had spent more than $310,000 to participate in the site selection process, and projected costs for continuing involvement were estimated at $300,000 per year. *See id.* at 67a. This projected appropriation far exceeded Cortand County's individual 1990 budgets for Juvenile Delinquent Care, Youth At Risk, Aid to Dependent Children, Alcohol Service, Mental Health, Stop DWI, and the Planning Department. *See id.*

Political heat generated by the selection of unnecessary, expensive, and environmentally unsuitable LLRW disposal sites is predictably directed largely at the state and local officials directly responsible for implementation of the siting process rather than at the federal politicians ultimately responsible for setting it in motion. *See id.* at 67a-69a, 81a-82a. In Cortland County, for example, protesters have repeatedly blocked the Siting Commission's access to the proposed site, and opponents have hounded New York's Governor during his appearances throughout the state. *See id.* at 68a-69a.

In sum, the intrusion upon state sovereignty effected by LLRWPAA is unprecedented. In the instant case, each branch of New York State government – legislative, executive, and judicial – has been conscripted into the service of federal goals. State legislative energies have been diverted to the drafting, debate, enactment, and revision of state LLRW disposal laws that would never have been contemplated but for the enactment of LLRWPAA. *See* J.A. 81a-82a. Congress has also commandeered New York's executive machinery by compelling the State to develop and administer new regulatory programs for

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J.A. 55a-58a. Medical and academic waste can be and often is stored on-site for decay and then disposed of in ordinary landfills. *See id.* at 56a. Nuclear power plants have stored high-level radioactive waste ("HLRW") on-site since they started operation and will probably be required to continue such storage for decades. *See id.* at 57a. Because the utilities produce highly radioactive Class "C" LLRW in very small volumes, that waste could very likely be stored without difficulty in their on-site HLRW storage facilities. *See id.* at 51a-52a.

land disposal. *See* 6 New York Codes, Rules & Regulations Part 382. Finally, New York's judicial processes will be compelled to assume the task of enforcing LLRWPAA's sanctions against the State – even without prior waiver of the State's sovereign immunity.

LLRWPAA's direct orders to the states, which were upheld by the courts below, do not "gradually erase the diffusion of power between State and Nation." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 584 (1985) (O'Connor, J., dissenting). Those commands, enforced with extraordinary punitive sanctions, summarily transform the states into instruments of the federal will. Because that incursion upon state sovereignty is inconsistent with fundamental principles of federalism expressed in the Tenth Amendment and the Guarantee Clause of the United States Constitution, the decision of the Court of Appeals should be reversed.

SUMMARY OF ARGUMENT

This challenge of LLRWPAA presents an issue of first impression for this Court: whether Congress may compel the states to exercise governmental functions in an area where they would prefer to remain inactive. All statutes previously reviewed by this Court have merely involved federal efforts to regulate ongoing, voluntary state activity. Because this Court has never addressed the situation presented here, neither the holding nor the theory of federalism developed in *Garcia* (which is indisputably the leading Tenth Amendment case) is directly controlling here. Consequently, this Court may, and should, declare LLRWPAA unconstitutional without applying *Garcia*'s Tenth Amendment standard.

LLRWPAA should be found unconstitutional because the statute violates limits on congressional power inherent in the constitutional structure. This Court has consistently recognized, irrespective of the particular theory of federalism that has governed the Court's decisions at any given time over the past 20 years, that a federal statute that compelled the states to undertake an activity against their will and precluded them from withdrawing from the field would violate constitutional principles of federalism. Because LLRWPAA is precisely such a

statute, the Court should expressly affirm the rule implicit in its prior decisions and declare LLRWPAA unlawful and void.

Even if *Garcia*'s Tenth Amendment standard were to be applied to the circumstances of this case, the Court should find LLRWPAA unconstitutional because the political safeguards intended to protect the sovereignty of the states failed when Congress enacted LLRWPAA. Contrary to the decisions of the courts below, those political safeguards cannot be understood to have fulfilled their function in this case merely because the states had an opportunity to participate in the legislative process. A properly functioning political system requires that Congress remain accountable for its actions when it imposes burdens on the states as states. Because Congress structured LLRWPAA to avoid such accountability, and to defeat the operation of natural political checks on federal power, LLRWPAA violates constitutional principles of federalism.

ARGUMENT

POINT I

LLRWPAA MAY BE FOUND UNCONSTITUTIONAL WITHOUT APPLYING *GARCIA*'S TEST FOR VIOLATIONS OF PRINCIPLES OF FEDERALISM

During the past 20 years, this Court has twice overruled Tenth Amendment cases, and, in so doing, has completely recast the standard governing Tenth Amendment challenges to federal acts. *See Garcia* (overruling, in 1985, *National League of Cities v. Usery*, 426 U.S. 833 (1976)); *National League of Cities* (overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968)). *National League of Cities* established four conditions for immunity from federal regulation under the Commerce Clause:

> First, it is said that the federal statute at issue must regulate "the 'States as States.'" Second, the statute must "address matters that are indisputably 'attribute[s] of state sovereignty.'" Third, state compliance with the federal obligation must "directly impair [the States'] ability 'to structure integral operations in areas of traditional governmental functions.'" Finally, the relation of state and federal interests must not be such that "the nature of the federal interest . . . justifies state submission."

Garcia, 469 U.S. at 537 (quoting *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 287-88 & n.29 (1981) (quoting *National League of Cities*, 426 U.S. at 845, 852, 854)). The Court rejected this test (the "Traditional Function Test") in *Garcia* and sought a standard that did not rely upon "predetermined notions of sovereign power." *Garcia*, 469 U.S. at 550.

The *Garcia* Court located the first line of defense for state sovereign interests in the "procedural safeguards inherent in the structure of the federal system" rather than in substantive exceptions from the commerce power. *Id.* at 552. The Court concluded that:

> the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate "a sacred province of state autonomy."

Id. at 554 (quoting *Equal Employment Opportunity Commission v. Wyoming* ("*EEOC*"), 460 U.S. 226, 236 (1983)). In recognizing the possibility of failure, the Court adumbrated a new test (the "Process Failure Test") for violations of constitutional principles of federalism. As is explained below, the Process Failure Test does not apply under the circumstances of this case.

A. *LLRWPAA Compels the States to Exercise Governmental Actions in an Area Where They Choose to Remain Inactive*

The coercive effect of LLRWPAA is evident on the face of the statute. The statute provides in unequivocal terms: "Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of" LLRW. 42

U.S.C. § 2021c(a)(1). No state is exempt from LLRWPAA's requirements; no state may cede the field to federal regulatory authorities; no state may transfer its federally imposed responsibilities to private generators of LLRW.

LLRWPAA also expressly provides:

> By July 1, 1986, each [state that is not a member of a compact region] shall ratify compact legislation, or, by the enactment of legislation or the certification of the Governor, indicate its intent to develop a site for the location of a low-level radioactive waste disposal facility within the State.

42 U.S.C. § 2021e(e)(1)(A). Thus, Congress has issued direct orders to the legislature or highest executive officer of each non-compact state, commanding specific action with respect to the establishment of a LLRW disposal facility. The statute also specifies in detail the contents of the siting plan that must be prepared by each of those states. *See id.* at § 2021e(e)(1)(B)(ii) and (iii). These are additional non-delegable duties imposed upon the states by the statute.

LLRWPAA thus does not merely require the states to *weigh* federal regulatory proposals governing *voluntary* state activity, as was the case in *Federal Energy Regulatory Commission v. Mississippi* ("*FERC*"), 456 U.S. 742 (1982). LLRWPAA sets "a mandatory agenda to be considered in all events by state legislative or administrative decisionmakers," *id.* at 769, and compels the states to *promulgate* congressionally prescribed laws or regulations to govern the states' *involuntary* participation in the LLRW disposal business. The fact that the statute affords some flexibility on administrative or technical matters does not mitigate the intrusion effected by LLRWPAA's "interference in the States' legislative processes, the heart of their sovereignty." *Thompson v. Oklahoma*, 487 U.S. 815, 877 (1988) (Scalia, J., dissenting).

Indeed, the federal government compounds the intrusion effected by LLRWPAA by forcing the states to operate in a

regulatory vacuum.[8] The specific "technical requirements for alternative methods" of LLRW disposal, promised for years by the NRC, 10 C.F.R. § 61.7, have yet to materialize. States may have traditionally served as "laboratories for . . . experiment," *Garcia*, 469 U.S. at 546, but Congress impermissibly intrudes upon state autonomy when it compels the states to develop disposal alternatives without adequate technological guidance.[9] *See FERC*, 456 U.S. at 777 ("State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study.") (O'Connor, J., concurring in the judgment in part and dissenting in part).

In addition to the affirmative disposal obligations imposed by LLRWPAA, the statute contains a novel and extreme penalty for a state's failure to provide for such disposal by 1996. The statute compels the state to take title to and possession of all LLRW offered to it from generators and owners producing such waste in the state or to assume liability for all damages incurred by those generators and owners as a result of the failure to accept that waste. To our knowledge, LLRWPAA is the first federal statute in the history of this nation seeking to impose such a liability on the states.[10]

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[8] The mere availability of a "technical position" on licensing alternative methods of disposal or of a standard guide review plan for the construction of earth covered cement vaults and bunkers, *see* C.A. App. 166, does not provide the sort of detailed regulatory structure required by states such as New York that are considering alternatives such as drift mines or deep vertical shaft mines.

[9] The lack of adequate technical guidance is especially burdensome when the physical features of a state — its hydrology, geology, and climate — are not conducive to radioactive waste disposal. *See* J.A. 59a.

[10] The extent of the liability that can be incurred as a result of taking title to and possession of radioactive waste is illustrated in *Amoco Oil Company v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989), where remedial costs for minor radioactive contamination at just one small site were estimated at $11-17 million.

B. Garcia *Applies Only When the Federal Government Attempts to Regulate Voluntary State Activity*

Both *National League of Cities* and *Garcia* involved challenges to the Fair Labor Standards Act ("FLSA"). The plaintiffs in those cases contested the application of FLSA's wage and hour provisions to employees of the states and their political subdivisions. The test developed in each case was thus designed to identify circumstances when the federal government could lawfully regulate employment practices of states and municipalities. Clearly, the specific holding of *Garcia* does not control the outcome of this case. *See City of Madison, Mississippi v. Bear Creek Water Association, Inc.*, 816 F.2d 1057, 1060-61 (5th Cir. 1987) ("Inasmuch as *Garcia* upheld the application of the Fair Labor Standards Act against a city entity as a valid execution of congressional power under the commerce clause, it may or may not be controlling in this case.").

More importantly, the general test adumbrated in *Garcia* does not apply in the circumstances described here. Both the Process Failure Test and *National League of Cities*' Traditional Function Test have consistently been applied only to statutes that regulate ongoing voluntary state activity.[11] LLRWPAA does not regulate activities that the state has chosen to undertake; it commands the states to undertake certain operations against their will.[12] These unprecedented direct orders to enter and remain

[11] *See, e.g., South Carolina v. Baker*, 485 U.S. 505 (1988) (issuance of state and local government bonds); *EEOC, supra* (state and local government employment); *FERC, supra* (public utility regulation).

[12] The federal respondents erroneously assert that Cortland County has failed to identify alternatives to LLRWPAA's compulsory scheme that would have provided for LLRW disposal without imposing unavoidable responsibilities on the states. *See* Brief for the United States in Opposition (to petitions for a writ of certiorari) at 21 n.24. As is set forth clearly in Cortland County's petition, there are a variety of indisputably lawful alternatives available and well known to Congress. *See* Cortland County's Petition for a Writ of Certiorari at 17-27. At least two of these alternatives are consistent with the states' expressed preferences at the time that LLRWPAA was enacted. First, Congress could have adopted the same system it has already employed for the

(Footnote continued)

in the LLRW disposal business remove LLRWPAA from the scope of *Garcia*.

C. Garcia *Recognizes Affirmative Limits on Federal Power Independent of the Operations of the Political Process*

Even if the instant case were governed by the decision in *Garcia*, the reasoning of that case supports Cortland County's argument that the Process Failure Test is inapplicable here. In developing that test, the Court repeatedly characterized the political process as the *primary* defense of state sovereignty. *See Garcia*, 469 U.S. at 554 (stating that the "fundamental" limitation on the Commerce Clause is one of process); *id.* at 556 ("[T]he principal and basic limit on the federal commerce power is that inherent in . . . built-in [systemic] restraints . . ."). The admission that process serves as "the *principal* means chosen by the Framers to ensure the role of the States in the federal system" carries with it the recognition that the political process alone may not adequately protect state sovereignty. *Id.* at 550 (emphasis added). In exceptional situations, such as that presented by the enactment of LLRWPAA, "affirmative limits" on federal action derived directly from the constitutional structure constrain congressional exercises of the commerce power. *Id.* at 556.

POINT II

CONGRESS EXCEEDED CONSTITUTIONAL LIMITS WHEN IT ENACTED LLRWPAA

The facts of *Garcia* did not require this Court to "identify or define" the affirmative limits imposed by the constitutional structure. *Id.* One need look no further than this Court's recent

regulation of nuclear materials, whereby the states may choose to regulate themselves or to have the federal government administer a regulatory program within their borders. *See* 42 U.S.C. § 2021(b). Alternatively, Congress could have implemented the NGA's funding recommendations, *see* J.A. 130a-31a, 133a (NGA Recommendations Nos. 8-9), by conditioning financial assistance upon compliance with federal requirements, *see South Dakota v. Dole*, 483 U.S. 203 (1987), instead of imposing the entire financial burden on the states, as it has done in LLRWPAA.

Tenth Amendment decisions, however, to find a clear indication of the character of that constraint. As the following analysis shows, the one principle that has survived the vicissitudes of the modern law of federalism — namely, the rule prohibiting the commandeering of state machinery for federal purposes — defines the limit on congressional power under the Commerce Clause.

A. *This Court's Decisions Identify the Constitutional Constraint on Federal Power Left Undefined in* Garcia

The nature of the protection afforded to the states by constitutional principles of federalism has been the subject of intense dispute on this Court throughout the tenure of *National League of Cities* and *Garcia*. Dissenting, and even concurring, opinions record the jurisprudential debate about the appropriate test to be applied when adjudicating Tenth Amendment cases. *See, e.g., South Carolina v. Baker* ("*S.C. v. Baker*"), 485 U.S. 505, 530-34 (1988) (O'Connor, J., dissenting); *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting); *EEOC*, 460 U.S. at 244-51 (Stevens, J., concurring).

The application of a prevailing Tenth Amendment standard in specific cases has also generated considerable controversy on the Court. Members of the majority in *National League of Cities* repeatedly criticized decisions applying the Traditional Function Test as insufficiently sensitive to the limits of federal power. *See EEOC*, 460 U.S. at 251-65 (Burger, C.J., dissenting); *id.* at 265-75 (Powell, J., dissenting); *FERC*, 456 U.S. at 772-75 (Powell, J., concurring in part and dissenting in part).

Despite the dissension, however, this Court has consistently affirmed that principles of federalism impose some limit on the power of Congress. Indeed, one very specific constraint emerges from the Tenth Amendment cases discussed below. The *per se* rule tacitly recognized in those cases bars Congress from commandeering state governmental processes to serve federal goals.

1. *Hodel*

Hodel involved a challenge to the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), which established federal environmental protection performance standards for coal mining operations. SMCRA permitted states to establish their own regulatory programs to implement the federal standards and provided for direct federal enforcement of the standards in the absence of such programs. Citing a "wealth of precedent" attesting to congressional authority to preempt state laws governing private activity, the Court upheld SMCRA's program of "cooperative federalism" against Virginia's Tenth Amendment challenge. *Hodel*, 452 U.S. at 289-90.

The option SMCRA offered to the states of ceding responsibility for mining regulation to the federal government was key to this Court's decision in *Hodel*. Because the states could simply withdraw from the field, "the States [were] not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever." *Id.* at 288. Under such circumstances, the Court rejected the "suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a regulatory program." *Id. Hodel* clearly implies that the statute would have unconstitutionally intruded upon the sovereignty of the states had it directly compelled such state action.

2. *FERC*

The federal requirements at issue in *FERC* were more intrusive than those in *Hodel*. In *FERC*, provisions of the Public Utilities Regulatory Policies Act ("PURPA") required state regulatory authorities to implement certain federal rules. *See FERC*, 456 U.S. at 759. PURPA also required that state utility commissions "consider," within certain deadlines, the adoption and implementation of specified ratemaking standards. *Id.*

The Supreme Court applied the doctrine of preemption in upholding the obligation to implement federal rules. A variation of the doctrine was also invoked to uphold the requirement that the state consider adoption of the specified standards. The

Court reasoned that because the federal government could have preempted all state regulation of utilities, it could adopt the less intrusive course of permitting the states to continue regulating on the condition that they merely consider the federal standards. *See id.* at 765.

Most significantly, the Court noted again that the states could avoid the intrusion effected by regulation under PURPA simply by ceasing the utility regulation governed by the statute. A state could avoid even the obligation to consider federal standards if it "simply stop[ped] regulating in the field." *Id.* at 764. This Court thus distinguished that obligation from "a federal command to the States to promulgate and enforce laws and regulations." *Id.* at 762; *see id.* at 764 (quoting *Hodel*, 452 U.S. at 288, in support of its conclusion that PURPA did not "commandeer" state governmental processes). The Court emphatically denied that its decision in *FERC* "authorize[d] the imposition of general affirmative obligations on the States." *FERC*, 456 U.S. at 769 n.32.

The emphasis on the distinction between federal regulation of voluntary state activity and direct commands requiring the states to undertake action specified by Congress confirms that the majority in *FERC* regarded such commands as constitutionally suspect. Had PURPA prevented the states from ceding utility regulation to the federal government, the outcome in *FERC* might well have been different. The reasoning in *FERC* suggests that the majority would have agreed that a statute compelling the states to enter and remain in a particular area of activity unconstitutionally forces them "to function as bureaucratic puppets of the Federal Government." *Id.* at 783 (O'Connor, J., concurring in the judgment in part and dissenting in part).

3. *South Carolina v. Baker*

Both *Hodel* and *FERC* were decided under the Traditional Function Test of *National League of Cities*. Even after that test was rejected and replaced in *Garcia*, however, this Court

continued to demonstrate concern that Congress refrain from "commandeering" state governmental processes. The opinion in *S.C. v. Baker* devotes a separate section to the claim that the statute at issue in that case impermissibly coerced state activity.[13]

S.C. v. Baker involved a challenge to section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), which removed the federal income tax exemption for interest earned on publicly offered long-term bonds issued by state and local governments unless those bonds were in registered form. TEFRA also imposed tax penalties on unregistered private corporate bonds. The plaintiffs argued that the statute unlawfully commandeered state legislative and administrative processes by effectively coercing states into enacting legislation authorizing bond registration and implementing the registration scheme.

The Supreme Court rejected this argument, stating: "That a state *wishing to engage in certain activity* must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *S.C. v. Baker*, 485 U.S. at 514-15 (emphasis added). Once again, the fact that the states could simply withdraw from the regulated field to avoid the imposition of federal requirements distinguished TEFRA from a statute that unconstitutionally commandeered state processes. The clear implication of the decision is that a statute that imposed obligations on the states and precluded them from withdrawing from the field would transgress Tenth Amendment limits.

B. *The Constraint Consistently Recognized by This Court Bars the Coercion Effected by LLRWPAA*

As the foregoing analysis demonstrates, the constitutional principle barring federal commandeering of state governmental

[13] The lengthy discussion of this claim suggests that the Court took it seriously, notwithstanding its ostensible uncertainty whether "the Tenth Amendment claim left open in *FERC* survives *Garcia*." *S.C. v. Baker*, 485 U.S. at 513.

processes transcends the competing theories of federalism manifest in recent Tenth Amendment jurisprudence.[14] Irrespective of the operative Tenth Amendment standard, this Court has consistently recognized that such commandeering offends affirmative constitutional limits on the power of Congress under the Commerce Clause. Moreover, the Court has repeatedly associated such commandeering with laws that preclude the states from ceasing activity they find burdensome because of federal requirements and ceding the field to the federal government.[15]

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[14] Even before the decision in *National League of Cities*, this approach was adopted by three circuit courts reviewing inspection and maintenance requirements imposed under the Clean Air Act. The Court of Appeals for the District of Columbia declared the requirements unconstitutional, reasoning that "the states . . . are to be protected from federal compulsion to exercise state governmental functions in an area where they choose to remain inactive." *District of Columbia v. Train*, 521 F.2d 971, 994 n.27 (D.C. Cir. 1975), *vacated and remanded for consideration of mootness sub nom. Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977). Similarly, the Ninth Circuit stated:

> [O]ur constitutional concerns [should not be] interpreted as disfavoring a determination by Congress that the states may regulate certain aspects of commerce . . .only in certain specified ways *if a state chooses to regulate that aspect of commerce at all.*"

Brown v. Environmental Protection Agency, 521 F.2d 827, 840 (9th Cir. 1975), *vacated and remanded for consideration of mootness*, 431 U.S. 99 (1977); *see also Maryland v. Environmental Protection Agency*, 530 F.2d 215 (4th Cir. 1975), *vacated and remanded for consideration of mootness sub nom. Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977). These cases are discussed in greater detail in Cortland County's petition for a writ of certiorari in this case.

[15] Lower federal courts have also followed this analysis. *See Nevada v. Skinner*, 884 F.2d 445 (9th Cir. 1989) (noting that the challenged statute, concerning maximum highway speed limits, only marginally altered the rules governing voluntary state activity), *cert. denied*, 493 U.S. 1070 (1990); *Delaware v. Cavazos*, 723 F. Supp. 234, 245 (D. Del. 1989) ("Delaware has failed to prove that it is being forced to participate in the [Guaranteed Student Loan ("GSL")] Program so that it has no choice but to be bound by all future amendments to the GSL Program. *** As such it follows that the 1987 Amendments do not violate the tenth amendment."), *aff'd mem.*, 919 F.2d 137 (3d Cir. 1990).

The instant challenge represents the first time that this Court has been asked to review the constitutionality of such a law. In enacting LLRWPAA, Congress ignored the constitutional history described above, directly ordered the states to undertake LLRW disposal, and foreclosed the possibility of their withdrawal from the field. Under these circumstances, this Court should expressly affirm the simple rule it has tacitly recognized in its prior decisions and invalidate LLRWPAA as an unconstitutional intrusion on the sovereignty of the states.

Affirmation of this rule is essential to preserve the advantages of the federalist system recognized by this Court in *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991). The states cannot effectively serve as a check on federal power if Congress can simply dictate a mandatory agenda for the states and compel the states to use their revenues for federal purposes. States will also find it difficult to be "sensitive to the diverse needs of a heterogeneous society," *Gregory v. Ashcroft*, 111 S. Ct. at 2399, if state policy is dictated by the federal government rather than by the local electorate. Nor will states be able to serve as laboratories for experiment if their agencies are conscripted into the national bureaucratic army. *See id.*; *FERC*, 456 U.S. at 775. To preserve the "federalist structure of joint sovereigns," *Gregory v. Ashcroft*, 111 S. Ct. at 2399, this Court should declare that the states' right to avoid federally imposed "general affirmative obligations," where states choose to remain inactive, has been unlawfully violated by the enactment of LLRWPAA.

POINT III

POLITICAL SAFEGUARDS FAILED TO PROTECT THE SOVEREIGNTY OF THE STATES WHEN CONGRESS ENACTED LLRWPAA

Cortland County has argued that this case can, and should, be decided in its favor without applying *Garcia*'s Process Failure Test. The reasoning of *Garcia* and other decisions of this Court amply supports the determination that LLRWPAA violates affirmative constitutional limits on congressional power. If the

Court finds, however, that the Process Failure Test applies in this case, LLRWPAA should nevertheless be found unconstitutional for the reasons set forth below.

A. Garcia *Should Not Be Understood to Write the Tenth Amendment out of the Constitution*

The crux of the decision to overturn *National League of Cities* rested in the *Garcia* majority's frustration with a test that required the Court to make substantive judgments about which governmental functions were "traditional" or "integral" to the operations of the states. *See Garcia*, 469 U.S. at 546-47. Nevertheless, in abandoning *National League of Cities*' test, the Court confirmed that "[t]he States unquestionably do 'retai[n] a significant measure of sovereign authority.' " *Garcia*, 469 U.S. at 549 (quoting *EEOC*, 460 U.S. at 269 (Powell, J., dissenting)). The Court acknowledged "that the Constitution's federal structure imposes limitations on the Commerce Clause," *Garcia*, 469 U.S. at 547, but rejected its prior attempt to "carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." *Id.* at 550. The Court sought instead to articulate a new, content-neutral "approach to defining limits on Congress' authority to regulate the States under the Commerce Clause." *Id.* at 547-48.

The *Garcia* Court thus did not abandon judicial review of Tenth Amendment questions. What the Court rejected was any attempt to resolve such questions by appeal to "freestanding conceptions of state sovereignty." *Id.* at 550. Judicial review of federal statutes remained essential for the protection of the "special and specific position in our constitutional system [occupied by the states]." *Id.* at 556.

In the lower federal courts, however, "the Tenth Amendment has become a 'dead letter' in constitutional law." *Smith v. Butterworth*, 678 F. Supp. 1552, 1557 (M.D. Fla. 1988) (quoting *Michigan v. Meese*, 666 F. Supp. 974, 977 (E.D. Mich. 1987), *aff'd*, 853 F.2d 395 (6th Cir.), *cert. denied*, 488 U.S. 980 (1988)), *rev'd on other grounds*, 866 F.2d 1318 (11th Cir. 1989), *aff'd*, 494 U.S. 624 (1990); *see also Bolin v. Cessna Aircraft Company*, 759

F. Supp. 692, 705 (D. Kan. 1991) (noting "the dormant state of tenth amendment jurisprudence"). Following the decision in *Garcia*, some courts have found it difficult to discern " 'what standard applies to issues' " of federalism and have evidently abandoned the effort to conduct Tenth Amendment analysis. *Butterworth*, 678 F. Supp. at 1557 (quoting *Meese*, 666 F. Supp. at 977). Others have simply concluded that the "Tenth Amendment is no more than a truism . . . ." *Meese*, 666 F. Supp. at 980.

More often, courts have eroded the protection afforded by the Tenth Amendment by failing to develop a concept of the political process that admits genuine possibilities of failure. Such courts, including the courts below in this case, presume that the political system operates properly as long as representatives of the complaining state have not been "inappropriately *denied* the opportunity to contribute input or otherwise participate" in the legislative process. *Nevada v. Burford*, 708 F. Supp. 289, 300 (D. Nev. 1989), *aff'd*, 918 F.2d 854 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2052 (1991). That assumption apparently led the District Court below to conclude that no defect in the political process could be found unless "somebody conspired to keep [a state's representatives] away from Congress." C.A. App. 368-69 (Transcript of Hearing, dated December 7, 1990).[16]

If the political process is conceived, however, so that nothing short of kidnapping a state's representatives to Congress constitutes evidence of malfunction, the Process Failure Test becomes a sham. That test can provide no constraint whatsoever on the actions of Congress if the notion of a political defect has no genuine application. In sum, *Garcia* may not be interpreted as

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[16] *Cf. Equal Employment Opportunity Commission v. Vermont*, 904 F.2d 794, 802 (2d Cir. 1990) ("There is no suggestion that Congress surreptitiously enacted any legislation without notice to the State of Vermont."). The Second Circuit's view that the opportunity to participate in the legislative process suffices to defeat any Tenth Amendment claim is reaffirmed in the instant case. *See State of New York v. United States*, 942 F.2d 114, 119-20 (2d Cir. 1991) (relying exclusively on the legislative history of LLRWPAA as evidence of the proper functioning of the political process), *cert. granted*, 60 U.S.L.W. 3294 (U.S. Jan. 10, 1992) (No. 91-543).

the courts below suggest if the test is to fulfill its intended purpose and the political process is to serve its protective function.

B. *Under a Proper Interpretation of* Garcia, *LLRWPAA Must Be Found Unconstitutional*

In applying the Process Failure Test, lower federal courts have not appreciated the relevance of the factors that led this Court to uphold the statute challenged in *Garcia*. As is demonstrated below, those factors identify two conditions that promote the political accountability of Congress. Because the political accountability of Congress is essential to the proper functioning of our political system, the failure to satisfy those conditions – as is the case with LLRWPAA – signals the type of process failure that warrants judicial intervention.

1. *Congressional Accountability Is Essential to the Protective Function of the Political Process*

For the political process to serve its protective function, Congress's accountability for actions that burden the states must be preserved. When Congress knows that it will answer directly to the electorate for burdens it imposes upon the states, a natural political check operates to curb unwarranted intrusion upon the autonomy of the states. When, on the other hand, the structure of a statute enables Congress to evade such responsibility, Congress "circumvents the political check on infringements of state sovereignty." *Texas v. United States* ("*Texas v. U.S.*"), 730 F.2d 339, 354 (5th Cir.), *cert. denied*, 469 U.S. 892 (1984). Evidence that Congress has avoided political accountability in enacting invasive legislation indicates that the political process has failed and the law violates constitutional principles of federalism. *See* Michelman, *States' Rights and States' Roles: Permutations of Sovereignty in National League of Cities v. Usery*, 86 Yale L.J. 1165, 1180 (1977) ("[C]ongressional interference is prima facie unreasonable if conditions are such that Congress will (or may) not be held (sufficiently) accountable to the electorate for that action.").

a. *Congress's Political Accountability Is Preserved When a Statute Imposes Burdens Equally on Private Entities and the States*

In determining that the internal safeguards of the political process performed as intended in the factual setting of *Garcia*, this Court focused on two key factors. First, the statute reviewed in *Garcia* imposed burdens on private firms and the states alike. *See Garcia*, 469 U.S. at 554 ("[The plaintiff] faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet."). When faced with the prospect of such legislation, states' interests are aligned with those of private business. Congress thus becomes accountable not only to the states but to private industry for the burdens it imposes in enacting the law.

When a statute imposes burdens on the states alone, and lifts such burdens from private industry, the states are placed at odds with their natural political allies. In such circumstances, the states' voice is likely to be far less effective in the national political process. The lobbying efforts of the states in defense of their sovereignty are likely to be overwhelmed by countervailing political (and economic) pressures exerted by national organizations of industries that stand to benefit from the intrusive legislation. *See Garcia*, 469 U.S. at 575 n.18 (Powell, J., dissenting) (noting "the rise of numerous special interest groups that engage in sophisticated lobbying and make substantial contributions to some Members of Congress"); Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 16 (1988) ("Congressional representatives increasingly draw their support from nationally organized interest groups, rather than from state political organizations.").

Representative democracy thus cannot be relied upon to protect the interests of the states when the states are deprived of their natural allies any more than it can be trusted to protect the interests of "discrete and insular minorities." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *see S.C. v. Baker*, 485 U.S. at 513 (citing *Carolene Products* in concluding

that the political process had functioned properly because South Carolina had not alleged "that it was singled out in a way that left it politically isolated and powerless"). Recognizing the "possible failing" in the political process in cases involving individual rights, the courts strictly scrutinize statutes that involve suspect classifications. Similarly, the judiciary should view with suspicion statutes that single out states for special burdens.

b. *Political Accountability Is Preserved When Congress Bears the Costs of Administration*

In upholding the statute challenged in *Garcia*, the Court noted that "Congress has not simply placed a financial burden on the shoulders of States and localities that operate mass-transit systems, but has provided substantial countervailing financial assistance as well, assistance that may leave individual mass-transit systems better off than they would have been had Congress never intervened in the area." *Garcia*, 469 U.S. at 555. That comment identifies the second factor that should be considered in applying the Process Failure Test. Where Congress successfully foists all or most of the financial burden of implementing a federal statute on the states, there is reason to believe that the political process may have failed to uphold constitutional principles of federalism. *See* Merritt, *supra*, at 17 (The "technique [of forcing state and local governments to administer national programs at state expense] permits Congress to escape fiscal accountability for its actions.").

The likelihood of process failure is greater still when a federal statute compels the states not merely to finance a regulatory program but to design, administer, and enforce it as well. "[T]he political accountability of Congress remains intact in the absence of direct congressional coercion of state action. If Congress enforces federal policy through its own agencies, the electorate will hold Congress responsible for that policy." *Texas v. U.S.*, 730 F.2d at 354-55. On the other hand, when Congress compels state and local governments to carry out unpopular federal policy, political censure is directed at those governments, while Congress avoids liability for the burdens it imposes. *See id.* at 354; Michelman, *supra*, at 1174.

Congressional compulsion of state legislatures, agencies, and courts not only "blurs the lines of political accountability," *FERC*, 456 U.S. at 787 (O'Connor, J., concurring in the judgment in part and dissenting in part), but enables Congress to achieve ends that "a majority of the national electorate affirmatively might well disapprove if it were required to bear the costs of implementing the national policy." La Pierre, *Political Accountability in the National Political Process – The Alternative to Judicial Review of Federalism Issues*, 80 Nw. U.L. Rev. 577, 660 (1985). Requiring the states to serve as agents of national policy circumvents the political safeguards of federalism provided by obstacles to direct federal enforcement (such as diseconomies of scale and political opposition to the creation of massive federal enforcement bureaucracies). *See* Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1244 (1977).

In sum, when a statute compels the states alone to bear the financial, administrative, and political costs of implementing national policy, the statute reduces Congress's accountability to its constituency. The failure to impose substantial costs on the federal government should therefore be regarded as a good indication of a defect in the political process just as the imposition of such burdens confirms that the process is working. *See Garcia*, 469 U.S. at 555. When Congress neither provides substantial funding for the program it imposes nor permits the states to withdraw from the field in favor of direct federal regulation, a serious constitutional question is raised under the principles of federalism affirmed in *Garcia*.

2. *Congress Avoided Political Accountability in Enacting LLRWPAA*

LLRWPAA lacks both of the characteristics that tend to ensure Congress's accountability for actions adversely affecting the states. It singles out states for the special and onerous burdens of siting, funding, designing, constructing, maintaining, and regulating LLRW disposal facilities. Moreover, in enacting the Take Title Provision of LLRWPAA, Congress severed the interests of the states from those of private LLRW generators by authorizing

those generators to transfer possession of their waste, or liability for it, to states that do not have disposal facilities by 1996.

In addition, by threatening punitive monetary sanctions, LLRWPAA directly compels the states to enact new legislation, promulgate and implement new regulations, and judicially enforce new legal obligations. Compliance with these new requirements has not been supported financially by the federal government — unlike in *Garcia*, where the plaintiffs received over $12 million of federal funding over two fiscal years. Nor has Congress assumed any obligations to administer or enforce the national LLRW disposal program, should the states prefer to withdraw from the field. Indeed, Congress has abdicated its responsibility entirely by transferring to the states the full obligation to dispose of LLRW, including all but a few categories of federally generated LLRW. *See* 42 U.S.C. § 2021c(a)(1)(B).

By compelling the states to undertake LLRW disposal, Congress is in fact escaping responsibility for the enactment of LLRWPAA. As the record in this case demonstrates, Congress has successfully blurred the lines of political accountability by requiring the states to administer unpopular siting programs. Protest — some of it so large scale and disruptive as to require mass arrests — has been directed at state and local officials, *see* J.A. 67a-69a, 81a-82a, instead of at the members of Congress who mandated the involuntary activity. Because the state cannot lawfully refrain from its siting activities, despite political pressure to do so, citizens are left "feeling that their representatives are no longer responsive to their needs." *FERC*, 456 U.S. at 787 (O'Connor, J., concurring in the judgment in part and dissenting in part).

The political checks that operate when regulation applies to states and private entities alike and when Congress bears the ultimate financial and administrative costs of its actions are therefore wholly absent in this case. The features of the political system that ordinarily ensure that Congress will respect the sovereignty of the states have been successfully evaded in the enactment of LLRWPAA. Under these circumstances, LLRWPAA should be found to fail the Process Failure Test for compliance with constitutional principles of federalism and should be declared unlawful and void.

POINT IV

THE "TAKE TITLE" PROVISION OF LLRWPAA SHOULD BE FOUND UNCONSTITUTIONAL, EVEN IF LLRWPAA'S DISPOSAL MANDATE IS UPHELD

Cortland County maintains that all of LLRWPAA's direct federal commands to the states violate constitutional principles of federalism. Nevertheless, the Take Title Provision, in particular, is so extreme and unprecedented a punitive measure,[17] that it warrants special attention from this Court.

The Take Title Provision threatens the states with immeasurable, and potentially enormous, liability. Congress has imposed this liability on the states despite the fact that they cannot control the production of the commercially generated LLRW and therefore cannot require the generators to adopt waste reduction measures that would limit potential costs to the states. Cortland County knows of no other statute in the history of this nation that attempts to impose such liability or to compel the transfer of dangerous waste to the states.

Contrary to the decision of the Second Circuit, *see State of New York v. United States*, 942 F.2d at 120-21, the cases cited in its opinion involving the contractual transfer of waste, *see General Electric Uranium Management Corp. v. United States Department of Energy*, 764 F.2d 896 (D.C. Cir. 1985); *Commonwealth Edison Co. v. Allied-General Nuclear Services*, 731 F. Supp. 850 (N.D. Ill. 1990), provide no authority for the Take Title Provision. In *General Electric*, the Secretary of Energy was permitted, not compelled, to contract with private parties who sought to transfer nuclear waste to the Department of Energy;

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[17] *See* 131 Cong. Rec. S18,113 (daily ed. Dec. 19, 1985) (statement of Sen. Johnston) ("It is a very far-reaching, difficult, and punitive provision, but we meant it to be precisely that."); 131 Cong. Rec. H13,077 (daily ed. Dec. 19, 1985) (statement of Rep. Markey) ("I cannot recall any statute which has ever sought to impose such a liability on States. The statute may not pass a constitutional challenge . . . .")

and the private parties, not the government, were fully responsible for the associated costs. *Commonwealth Edison* involved two private parties who voluntarily entered a contract providing for transfer of the waste. New York has never agreed to take possession of, or liability for, privately generated LLRW.[18] The Take Title Provision, unlike a contract, effects a forcible transfer against New York's will.

The extremity of the Take Title Provision has been recognized even by Congress's own legal advisers. Prior to passage of LLRWPAA, the Congressional Research Service found that the provision raised questions under the Tenth Amendment. *See* 131 Cong. Rec. H13,077 (daily ed. Dec. 19, 1985) (statement of Rep. Markey). The federal respondents in fact concede that "this provision, if actually triggered in a particular instance in the future, might raise further federalism concerns."[19] *See* Brief for the United States in Opposition (to petitions for a writ of certiorari) at 25. For these reasons, as well as those articulated in Points I-III of this brief, the Take Title Provision provides the clearest basis for declaring LLRWPAA unconstitutional.

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[18] The alleged "exchange" repeatedly invoked by the federal respondents, *see* Brief for the United States in Opposition (to petitions for a writ of certiorari) at 3, 10, 16, 18, whereby Congress assigned disposal responsibility to the states in return for the right, as a member of a compact, to exclude LLRW generated outside the compact region, has no bearing on this case. New York is not a member of a compact and has not surrendered any element of its sovereignty in exchange for exclusionary rights.

[19] The federal respondents hint, without actually claiming, that the constitutionality of the Take Title Provision is not ripe for review at this time. *See* Brief for the United States in Opposition (to petitions for a writ of certiorari) at 19 n. 23, 25. Cortland County respectfully suggests that New York should not be forced to wait until it is sued for damages under LLRWPAA before raising the instant claim. In any event, the respondents at best raise a question of fact that cannot be settled on the present record. If this Court is seriously troubled by the issue of ripeness, which it should not be, the case should be remanded for a hearing on the relevant factual questions.

CONCLUSION

For the reasons set forth above, Cortland County respectfully requests that the decisions of the courts below be reversed and that LLRWPAA be declared unconstitutional and void.

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